

The implementation of the United Nations Security Council Resolution 1973 on Libya



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1 Introduction

In our increasingly globalized and interconnected world, state actors almost immediately get aware of atrocities happening to people in other countries. When the international society is alerted to unfolding mass atrocities by a state directed towards its citizens, it is confronted with the choice between turning its back on the violations of human rights and to take necessary action to protect the victims.

1.1 The Objectives of the study

The purpose of this thesis is to examine the principle of the responsibility to protect and its application in the United Nations Security Council resolution 1973 on the situation in Libya. Furthermore it will be discussed whether the coalition forces have carried out the military operations in Libya within the scope of resolution 1973.

1.2 The Relevance of the study

Following the revolution that unfolded in Tunisia and spread to Egypt in the early months of 2011, from February 15, civilians in Libya gathered for peaceful protests against the regime of Colonel Muammar Qaddafi, calling for democratic reform and respect for human rights.¹ The opposition group established the Interim Transitional National Council and enjoyed quick success in the beginning of the demonstrations. However, Qaddafi and his security forces responded by opening fire on crowds of peaceful demonstrators, and the situations in Libya rapidly turned into mass revolt.² On February 18 the UN High Commissioner for Human Rights, Navi Pillay, condemned the use of lethal force by security personnel in Libya, which had already led to the death of more than 20 protestors as well as hundreds of people being injured.³ The Office of the High Commissioner for Human Rights (OHCHR) also reported on beatings and other acts of ill-treatment and a number of people being arbitrarily detained.⁴ A number

¹ OHCHR (18February2011)

² HRW (22february2011)

³ OHCHR (18February2011)

⁴ OHCHR (18February2011)

of Libyan government officials, diplomats and military officers left the Qaddafi regime in protest against the bloody crackdown on the demonstrators.⁵ By early March Qaddafi had lost control over most of the eastern part of the country, including the city of Benghazi. On the 5th of March 2011 the rebels reconstituted the National Transitional Council in Benghazi.⁶

The OHCHR received reports about foreign 'mercenaries' in the killing of protesters, and there were grave concerns of arbitrary arrests of protesters including lawyers, human rights defenders and journalists.⁷ The Libyan government did also attempt to restrict the broadcasting of the situation in the country by cutting off landlines and internet access and restricting media coverage.⁸

Condemnations of the violent suppression of Qaddafi mounted from both the UN and regional organizations. The UN Secretary-General, Ban Ki-moon expressed his outrage over the reported use of warplanes and helicopters to fire at demonstrators.⁹ The UN High Commissioner for Human Rights called for an immediate cessation of the human rights violations committed by Libyan authorities and said that the reported use of machine guns, snipers and military planes against the demonstrators was unconscionable.¹⁰ On February 22 the Arab League decided to suspend Libya from League meetings¹¹ and on the same day the Organization of the Islamic Conference issued a statement saying that it 'considers the ongoing coercion and oppression in Libya as a humanitarian catastrophe.'¹² On February 24 the African Union condemned 'the disproportionate use of force' against Libyan civilians.¹³

⁵ The Guardian (21February2011)

⁶ National Transitional Council (2011)

⁷ OHCHR (22February2011)

⁸ OHCHR (22February2011)

⁹ UN Doc. SG/SM/13408

¹⁰ OHCHR (22February2011)

¹¹ UNNews (23February2011)

¹² CNSNews (23February2011)

¹³ News24 (24February2011)

Regardless of the international condemnations, Qaddafi continued the brutal crackdown and called on his supporters to attack the demonstrators.¹⁴ On the other hand the protesters continued to challenge the Qaddafi-rule and called on the UN for protection.

On February 25 the High Commissioner of Human Rights noted that the suppression of the protesters was escalating with shocking reports of arbitrary deprivation of life, arbitrary arrests, detentions, enforced disappearances, torture and ill treatment and even the use of foreign mercenaries.¹⁵ Libyan forces were firing at random protesters and bystanders from rooftops and from tanks. During the violent crackdown on demonstrators at the time, several hundred people died and thousands were injured.¹⁶ Furthermore, the crisis in the country unleashed a flow of refugees, with the risk of further instability in other areas of the region.¹⁷

The situation in Libya led the Security Council to unanimously adopt Security Council resolution 1970 on February 26, 2011. The Council expressed ‘grave concern at the situation in the Libyan Arab Jamahiriya,’ deplored the ‘gross and systematic violation of human rights’ and demanded ‘an immediate end to the violence.’¹⁸ Despite the implementation of measures pursuant to resolution 1970 and the condemnations by the Security Council and the regional organizations, the Libyan Government continued the brutalities against its own people. Reports revealed that the Libyan government had intensified its fighting, launched indiscriminate air strikes at civilians resulting in several killed and injured, had continued to detain journalists,¹⁹ in addition to reports of an immense passage of weapons throughout the Libyan territory.²⁰

On March 17, speaking on a radio show in Tripoli, Qaddafi raised the levels of urgency on the situation saying that his forces would begin an assault on the city of Benghazi the

¹⁴ Aljazeera (23February2011)

¹⁵ OHCHR (25February2011)

¹⁶ OHCHR (25February2011)

¹⁷ OHCHR (14March2011)

¹⁸ UN Doc. S/RES/1970 para.1

¹⁹ OHCHR (10March2011)

²⁰ OHCHR (14March2011)

same night.²¹ ‘We will come house by house, room by room. It’s over. The issue has been decided,’ he said, offering amnesty to those who laid down their arms.²²

To avert a blood bath in Benghazi, the Security Council later on March 17 adopted resolution 1973 determining that the situation in Libya continued to ‘constitute[d] a threat to international peace and security’ and called for an immediate ‘cease-fire and a complete end to violence and all attacks against, and abuses of, civilians’.²³ The Council further authorized member nations to take “all necessary measures” to protect civilians.²⁴ Resolution 1973 marks the first time the Security Council authorized the use of force for human protection purposes against the wishes of a functioning state.²⁵

Regardless of the passing of resolution 1973, the Libyan government continued to conduct offensive operations, and even increased these, against its people. On March 19 an ad hoc coalition of states – including the United States, the United Kingdom and France – launched a number of airstrikes against military targets in Libya to enforce resolution 1973. By the end of March NATO, under Operation Unified Protector, had taken over the command of the international military operation in Libya.²⁶

Shortly after resolution 1973 was passed and the operation had begun, disagreements emerged as to how the mandate should be interpreted. On the day the operations initiated, the Chinese government expressed regret at the American and European attack on Libya²⁷ with Russia following up by condemning the attack.²⁸ On March 27 NATO Secretary-General Rasmussen underlined that NATO Allies would implement all aspects of the UN resolution – ‘nothing more, nothing less’ – in order to protect civilians and civilian populated areas under attack or threat of attack from the Gaddafi

²¹ NYT (17March2011)

²² NYT (17March2011)

²³ UN Doc. S/RES/1973

²⁴ UN Doc. S/RES/1973, para 4

²⁵ Bellamy (2011)

²⁶ NATO (2011), *NATO and Libya - Operation Unified Protector*

²⁷ The Guardian (19March2011)

²⁸ The Guardian (19March2011)

regime.²⁹ None the less, both Russia and China, as well as the President of South Africa, Jacob Zuma, have on several occasions urged that the mandate should not be given an arbitrary interpretation³⁰ and have expressed that NATO's actions has overstepped the UN mandate in Libya.³¹

After months of armed conflict between the pro-Qaddafi forces and the rebels, and the NATO military operation in the country, the NTC forces were by September in control of the capital city, Tripoli, in addition to the eastern and western areas of the country. On October 20 media reported that Qaddafi had been killed after an assault on his home town of Sirte. A number of videos have emerged on the internet in which he is pulled through the streets of Sirte, bloodied and unkempt and surrounded by jubilant rebels.³² Precisely what happened next remains unclear but at some point Gaddafi was shot in the head.³³

On October 23 in Benghazi the leaders of the NTC made an official declaration of the liberation of Libya. After eight month of protests and fighting between the opposition forces and the pro-government forces the Qaddafi regime had ended.

On October 27 BBC reported that the family of the deceased Qaddafi will file a war crimes complaint against NATO with the International Criminal Court.³⁴ Also the President of South Africa has spoken that the Court should investigate the military operations carried out by NATO and its allies.³⁵ On November 2 the Prosecutor of the International Criminal Court said that the office will examine the allegations of crimes committed by NATO and the NTC-forces.³⁶

²⁹ NATO (2011), *NATO and Libya - Operation Unified Protector*

³⁰ UN Doc. S/PV.6528, p. 9

³¹ France24 (15April2011)

³² The Telegraph (20October2011)

³³ The Telegraph (20October2011)

³⁴ CNN Wire Staff (2011)

³⁵ NRK (9September2011)

³⁶ UN Doc. S/PV.6647

1.3 Methodology

Security Council resolution 1973 constitutes the legal basis for the armed operation by NATO and its allies in Libya. In resolution 1973 the Security Council recalls its earlier resolution 1970, which together with resolution 1973 have a combined and cumulative effect. While the scope and limits of the authorization to use armed force in paragraph 4 of resolution 1973 is the main focus for this thesis, resolution 1970 will be interpreted where it in combination with resolution 1973 makes the legal basis.

The Security Council resolutions 1970 and 1973 will be interpreted in accordance with the applicable rules on interpretation of resolutions as set forth by the International Court of Justice in its Kosovo Declaration of Independence Advisory Opinion.³⁷

Relevant treaties for this thesis are the UN Charter, and treaties of international humanitarian law. The UN Charter governs the use of force in international relations, the rules of jus ad bellum, and Security Council resolutions 1970 and 1973 are adopted under Chapter VII of the Charter.

Treaties of international humanitarian law are applicable as these set forth principles and rules which apply to situations of armed conflict, the rules of jus in bello.³⁸ The crisis in Libya qualifies as an armed conflict as the pro-government forces and the rebels, as well as NATO use forceful measures against one another. The applicable international treaties of this thesis will be interpreted in occurrence with the provisions of interpretation in Article 31 and 32 of the Vienna Convention on the Law of Treaties.

Other related resolutions of the Security Council will also be analyzed, as will resolutions by and discussions at the General Assembly. Finally, relevant judicial decisions of international Courts will be referred to.

³⁷ Kosovo Declaration of Independence, ICJ (2010), p. 34, para. 94

³⁸ Zwanenburg (2010)

1.4 Structure

To achieve the above stated objectives, this thesis is separated into four parts. Part 1, the introduction, gives a brief overlook of the thesis. Part 2 provides for a discussion of the implementation of the responsibility to protect. Part 3 analyzes the legality of the military operations carried out in Libya. This part focuses on interpreting the scope of the Security Council resolution 1973. Finally, part 4 provides for a consideration of the effect the military operation in Libya might have on the international response to future humanitarian crisis.

2 The Responsibility to Protect

In brief, the principle of the responsibility to protect recognizes that populations should be protected in certain situations of humanitarian disasters.

2.1 Legal basis for the use of force

The central rule on the use of force, the prohibition of the threat or use of force of member states in their international relations, is stipulated in Article 2(4) of the UN Charter. The prohibition is not only a treaty obligation, it is also a rule of customary international law applying to all states.³⁹

Pursuant to Article 2(4), the threat or use of armed force in general in the international relations between states is prohibited.⁴⁰ The text of the provision only deals with ‘international relations’ and does not cover the use of force solely within a state.⁴¹ Consequently the provision does not prohibit rebels from starting a civil war, nor the government concerned from using military force against them.⁴² In its Nicaragua case the Court stated that ‘the participation in acts of civil strife... in another State when the acts of civil strife... involve a threat or use of force’ is contrary to the prohibition of the use of force.⁴³ The relations between groups undergoing a civil war and the participation of a second state are thus to be regarded as international relations and fall within the scope of Article 2(4).⁴⁴

The prohibition of the use of force following from Article 2(4) of the UN Charter and customary law is closely related to the principle of non-intervention. The latter principle is not explicitly enshrined in the UN Charter, but it has been affirmed as a principle of

³⁹ Nicaragua v USA, para.174

⁴⁰ The Charter of the United Nations, a Commentary (2002) p. 117

⁴¹ The Charter of the United Nations, a Commentary (2002) p. 121

⁴² The Charter of the United Nations, a Commentary (2002) p. 121

⁴³ Nicaragua v USA, para.228

⁴⁴ The Charter of the United Nations, a Commentary (2002) p. 121

customary international law by the Court⁴⁵ and by the UN General Assembly.⁴⁶ The principle of non-intervention may furthermore implicitly be drawn from Article 2(1) and 2(7) of the UN Charter.

In the Nicaragua case, the Court said that “the principle of non-intervention involves the right of every sovereign state to conduct its affairs without outside interference”.⁴⁷ According to the principle of non-intervention all states are prohibited to intervene directly or indirectly in internal or external affairs of other states by coercive measures.⁴⁸ Essentially, states shall not exercise their authority within the jurisdiction of other states.⁴⁹ Sovereign states enjoy the sole jurisdiction over their own territory. In its Nicaragua case the Court concluded that acts constituting a breach of the customary principle of non-intervention will also, if they directly or indirectly involve the use of force, constitute a breach of the principle of non-use of force in international relations.⁵⁰

The legal regime of the UN Charter provides for only two exceptions from the prohibition of the threat or use of force in Article 2(4), namely Security Council enforcement actions under Chapter VII and the right of individual and collective self-defence against an armed attack pursuant to Art 51.

By virtue of the duties of the Security Council under Article 24 of the UN Charter as having the ‘primary responsibility for the maintenance of international peace and security’ and its powers under Article 39, the Security Council is entitled to determine the ‘existence of any threat to the peace, breach of the peace, or act of aggression’. The determination of the Security Council is a condition for the use of the particular measures provided for in Chapter VII.⁵¹ A decision taken under Article 39 may take the form of provisional measures under Article 40 or enforcement measures under Article

⁴⁵ Nicaragua v USA, para.174

⁴⁶ UN Doc. UNGA Res. 2625 (XXV); UN Doc. UNGA Res 2131 (XX)

⁴⁷ Nicaragua v USA, para.202

⁴⁸ Nicaragua v USA, para.205

⁴⁹ Nardin (2006)

⁵⁰ Nicaragua v USA, para.209

⁵¹ The Charter of the United Nations, a Commentary (2002) p.726

41 or 42, to maintain or restore international peace and security. Pursuant to Article 41 the Council can take sanctions short of armed force. Should the Security Council decide that measures provided for in Article 41 would be inadequate or have already proved to be inadequate, it can take measures involving armed force under Article 42.

2.2 The challenge upon the international community

The issue of external intervention for human protection purposes has since the end of the Cold War and until the present day presented the international community with controversial and challenging dilemmas. If there are massive atrocities, can sovereignty be forfeited on humanitarian grounds? Who decides whether the international community should act? What is the appropriate response?

The 20th century has examples of failure of both the UN and the great powers to act when facing massive atrocities. During the Second World War there was the Holocaust. In 1994 the Rwanda genocide took place, where hundreds of thousands of Rwandans were slaughtered despite the forewarning of both the United Nations Assistance Mission in the area and the major powers about the massacre that was about to unfold.⁵² The UN stood at the sideline and the situation in Rwanda became the symbol of international indifference and hardness.⁵³

A year later, in July 1995, the horror in Yugoslavia unfolded in Srebrenica where about 7500 Bosnian males were taken from the town, a UN-protected 'safe area', and massacred. The crimes that took place were described by Kofi Annan, at the time UN Secretary-General, as 'the worst on European soil since the Second World War'.⁵⁴

In March 1999 NATO began a military intervention in Kosovo without a prior Security Council authorization as the Council was unable to act due to internal disagreements. The 78 day period of aerial bombing was taken to forestall the ongoing humanitarian catastrophe in the area. The military operation for humanitarian purposes in Kosovo by

⁵² Thakur (2010), p.44

⁵³ Thakur (2010), p.44

⁵⁴ UN Doc. SG/SM/9993

NATO has seen a number of disapprovals as a blatant violation of international law. The NATO operation and the inaction of the Security Council initiated a more general debate about how to respond to massive and systematic violations of human rights, and when and by whom.

In his speech before the United Nations General Assembly in 1999 and again in his Millennium Report to the at that time General Assembly, Secretary-General Kofi Annan, raised the following question: ‘If humanitarian intervention is, indeed, an unacceptable assault on sovereignty, how should we respond to a Rwanda, to a Srebrenica – to gross and systematic violations of human rights?’⁵⁵

The struggle here is to strike a balance between, on the one hand, the prohibition of the threat or use of force and the principles of non-intervention and state sovereignty and on the other hand, the international community’s duty to respond to gross and systematic violations of human rights.⁵⁶

In response to the challenge posed by the Secretary-General, the Government of Canada established the International Commission on Intervention and State Sovereignty (ICISS).⁵⁷ The mandate of this Commission was to develop a global political consensus on when, if ever, “it is appropriate for states to take coercive – and in particular military – action against another state for the purpose of protecting people at risk in that other state” and under whose authority. In December 2001 the Commission presented its report entitled the Responsibility to Protect. The Commission made a broad framework with three essential elements, ‘the responsibility to prevent’, ‘the responsibility to react’ and ‘the responsibility to rebuild’,⁵⁸ posing a continuum of graduated policy instruments across that spectrum. The ‘responsibility to react’ represents a model for taking an approach to humanitarian crises, from economic, political and military sanctions to military intervention as a last resort.

⁵⁵ Annan (2000) para. 217

⁵⁶ Fiott (2008)

⁵⁷ Report of ICISS (2001)para.1.7

⁵⁸ Report of ICISS (2001)para.2.29

The Commission embraced the concept of ‘sovereignty as responsibility’ emphasizing that state sovereignty entails responsibilities as well as rights, whereas one such responsibility is to protect the fundamental rights of the people within its jurisdiction. The responsibility to protect acknowledges that the primary responsibility rests with the state concerned, but when a state is unable or unwilling to fulfill this responsibility, it becomes the responsibility of the wider international community to act in its place.⁵⁹ This shows that only states which fulfill their sovereign responsibilities are entitled to the full specter of sovereign rights.

2.3 Implementation of the Responsibility to Protect

The Responsibility to Protect was unanimously affirmed by the large gathering of Heads of State and Government at the UN World Summit on 14 September 2005.⁶⁰ In paragraph 138 of the World Summit Outcome Document, the assembled world leaders recognized the responsibility of each individual state to protect its population from genocide, war crimes, ethnic cleansing and crimes against humanity, often called atrocities.

Should peaceful means be inadequate and national authorities manifestly fail to protect their populations from the four specified crimes, the international community is prepared to take ‘collective action, in a timely and decisive manner, through the Security Council’ under Chapter VII, in accordance with the Charter, ‘on a case-by-case basis.’⁶¹ Military action can only be taken as a last resort and Security Council authorization is necessary.

⁵⁹ Report of ICISS (2001)para.2.29

⁶⁰ UN Doc.A/RES60/1

⁶¹ UN Doc.A/RES60/1,para.139

3 Are the military operations in Libya carried out within the scope of resolution 1973?

Having established the framework of the collective security system and the responsibility to protect, the analysis will now turn to a case study of the situation in Libya and examine the legal framework for the military intervention and the legality of some of the actions carried out by the coalition forces.

3.1 Measures authorized in Resolution 1970 and 1973

In the resolution the Council specifically invokes ‘the Libyan authorities’ responsibility to protect its population’ and emphasizes its strong commitment to ‘the sovereignty, independence, territorial integrity and national unity of the Libyan Arab Jamahiriya’. With awareness of its responsibility for the maintenance of international peace and security under the Charter of the United Nations, the Security Council chooses to act under Chapter VII and demands ‘an immediate end to the violence’. The Council adopts a series of coercive measures on Libya, short of the use of armed force under its Article 41. First, the Council refers the situation in Libya to the Prosecutor of the International Criminal Court. Secondly, the Council imposes an arms embargo on the Libyan Arab Jamahiriya. Thirdly, targeted sanctions are imposed on Qaddafi, members of his family and his accomplices, including travel ban and asset freeze. Finally, the Council establishes a sanctions committee. From the range of measures taken in Resolution 1970 it seems as if these are designed to be preventive to discourage Qaddafi and those around him from committing atrocities, as well as to ensure that the conflict does not escalate.

Security Council Resolution 1973 was adopted by a vote of 10 in favor to none against, with 5 abstentions, Brazil, China, Germany, India and Russia. In resolution 1973 the Council first deplores ‘the failure of the Libyan authorities to comply with resolution 1970’ and expresses its concern for the ‘deteriorating situation, the escalation of violence and the heavy civilian casualties’. Further, the Council underlines ‘the responsibility of the Libyan authorities to protect the Libyan population’. The Council

then expresses 'its determination to ensure the protection of civilians and civilian populated areas'. These phrases show that it is the obligation of the state to protect its population, but when the state fails, the Council will secure civilian protection, although it has not articulated that it has an obligation to do so. The above mentioned phrases demonstrate that Resolution 1973 is about defending the civilian population against attacks from the population's own authorities.

The Council once more reaffirms its 'strong commitment to the sovereignty, independence, territorial integrity and national unity of the Libyan Arab Jamahiriya,' underscoring that the resolution is not about invading, dividing, undermining or dismembering Libya. The Council then states that it will act 'under Chapter VII of the Charter of the United Nations' which enables a continuation of coercive measures. The Council authorizes 'all necessary measures' to protect civilians in Libya, to enforce the arms embargo established under resolution 1970 and to enforce the imposed no-fly-zone as well as strengthening the sanctions regime of resolution 1970 and establishing a panel of experts.

Contrary to its reference to Article 41 of the UN Charter as the legal basis in resolution 1970, the Council does not specify the precise legal basis in resolution 1973. When the Council in resolution 1973 deplores that resolution 1970 was not complied with and thus acknowledges that the measures under Article 41 were inadequate and again acts under Chapter VII, this time without specifying under which Article, it shows that the Council acts under Article 42 and authorizes the use of armed force.

In both resolutions 1970 and 1973, the Security Council uses the language of the Responsibility to Protect, when it insists on the responsibility of the Libyan authorities to protect the Libyan population. The two resolutions further invoke the responsibility to protect when these in the preambles consider that 'the widespread and systematic attacks' against the civilian population in Libya 'may amount to crimes against humanity', which are among the four categories of crimes the doctrine of the responsibility to protect determines that populations shall be protected from.⁶² The

⁶² UN Doc. A/RES/60/1 para.138,139

recent crisis in Libya has put the responsibility to protect as an operational principle to the test.

3.2 Questions concerning the legality of the coalition's acts in Libya

Controversial debates about the legality and the legitimacy of the military intervention in Libya in pursuance of the United Nations Security Council resolutions 1970 and 1973 have been initiated. The interpretation of the scope and the limits of the two resolutions and which military actions these permit have turned into a contentious matter. Among the questions which have been raised is whether resolution 1973 justifies the targeting of the Qaddafi regime, whether the coalition forces lawfully can arm the Libyan rebels and whether resolution 1973 allows for the coalition to deploy ground forces on Libyan territory. The thesis will in the following discuss these issues.

3.3 The legality of targeting the Qaddafi regime

On March 21 2011, BCC reported that during the second night of missile strikes, on Sunday March 20, Qaddafi's Bab al-Aziziya complex was hit.⁶³ The strike on the Bab al-Aziziya complex raised questions about how far resolution 1973 permitted the coalition acting in Libya to go considering military action directed against the Qaddafi regime. Differing opinions were being put forth concerning whether the resolution permitted the coalition to target the Qaddafi regime, thus the legality of actions ranging from the targeting of the forces of Qaddafi to targeting Qaddafi in person and whether resolution 1973 in fact opened up for a forcible regime change in Libya.

During the armed conflict in Libya, the intensity of the military actions carried out by the coalition forces towards the Qaddafi regime has seen an increase. On May 4, Grete Faremo, at that time the Norwegian Minister of Defence, held that Operation Unified Protector, with NATO in command, was separated into three phases.⁶⁴ In the first phase, NATO and its allies focused on various ground-based devices and systems that constituted an immediate threat to the civilian population.⁶⁵ Airstrikes were launched at Qaddafi's forces advancing on Benghazi and other cities and at masses of his forces

⁶³ Kuenssberg (2011)

⁶⁴ Faremo (2011)

⁶⁵ Faremo (2011)

within these areas. In the second phase, NATO focused on strategic goals of importance for the regime's capability of command and control.⁶⁶

Faremo held that the final phase will focus on ensuring that the regime will comply with the resolutions of the Security Council. The third phase of the armed conflict has not been as envisaged and in this phase NATO and its allies have carried out even more intense military actions than in the two earlier phases. While the rebels advanced on cities held by the pro-government forces such as Tripoli in the end of August,⁶⁷ Bani Walid in Mid-September⁶⁸ and Sirte in the end of September,⁶⁹ NATO launched air strikes at the same areas. It has also been held that NATO has directed strikes towards Qaddafi himself and his family.⁷⁰

For the purpose of discussing the legality of NATO's operation directed at the Qaddafi regime, each of the three above described phases will be considered separately.

Both the customary rule of non-intervention in international affairs and the prohibition on the use of force in international relations pursuant to Article 2(4) of the UN Charter forbid any form of armed intervention in the territory of another state. These rules clearly cover the armed operations carried out by NATO on Libyan territory in all three phases. Absent an authorization in Security Council resolution 1973 permitting military operations directed towards the Qaddafi regime, the operation by NATO would violate Article 2(4) of the UN Charter and the rule of non-intervention.

As the enforcement of resolution 1973 contemplates the use of armed force by a coalition of states against the state of Libya, the military measures taken are also governed by international humanitarian law.⁷¹ Regardless of Article 103 of the UN Charter, it was reiterated in a Secretary-General's Bulletin entitled 'Observance by

⁶⁶ Faremo (2011)

⁶⁷ BBC News (21August2011)

⁶⁸ NRK (9October2011)

⁶⁹ BBC News (28September2011)

⁷⁰ BBC News (1May2011)

⁷¹ Schmitt (2011)

United Nations Forces of International Humanitarian Law’ that the fundamental principles and rules of international humanitarian law are applicable to Chapter VII enforcement actions,⁷² which necessarily include operations taken to implement resolution 1973. NATO and its allies must comply with international humanitarian law when carrying out resolution 1973.

The relevant principles and rules of international humanitarian law are set forth in the provisions of Additional Protocol I of the Geneva Conventions. The principle of distinction expressed in Article 48 of the Protocol, stipulates that belligerents shall distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly ‘shall direct their operations only against military objectives’. Article 52 defines ‘military objectives’ as those which by their nature, location, purpose or use ‘make an effective contribution to military action’ and whose destruction, capture or neutralization, at the time, ‘offers a definite military advantage.’ International humanitarian law thus requires that the Qaddafi regime, including the pro-government forces, command and control centers and Qaddafi in person, is a legitimate military objective in order to be targeted. In addition the rules of proportionality⁷³ and the requirement to take ‘precautions in attack’⁷⁴ apply fully. This thesis will discuss whether NATO’s military action directed towards the Qaddafi regime in the three phases is within the scope of the mandate of Security Council resolution 1973. The further discussion is based on the assumption that international humanitarian law is complied with.

⁷² UN Doc. ST/SGB/1999/13, Schmitt (2011)

⁷³ Protocol I Additional to the Geneva Conventions Article 51(5)(b), 57(2)(a)(iii), 57(2)(b)

⁷⁴ Protocol I Additional to the Geneva Conventions Article 57

3.3.1 Airstrikes directed at Qaddafi's advancing forces

The thesis will now address the question of whether NATO and its allies have acted within the mandate of Security Council resolution 1973, in the first phase of the conflict, when launching airstrikes at Qaddafi's forces advancing on Benghazi and other cities and at masses of his forces within these areas.

The specific legal starting point is paragraph 4 of resolution 1973. The provision authorizes Member States 'to take all necessary measures... to protect civilians and civilian populated areas under threat of attack in the Libyan Arab Jamahiriya, including Benghazi, while excluding a foreign occupation force of any form on any part of Libyan territory.'

In the Kosovo Advisory Opinion, the International Court of Justice set applicable rules of interpretation of Security Council Resolutions.⁷⁵ The Court first noted that 'the rules on treaty interpretation embodied in Articles 31 and 32 of the Vienna Convention on the Law of Treaties may provide guidance.' The Court further said that 'the interpretation of Security Council resolutions also requires that other factors be taken into account.'

The interpretation may require an analysis of 'statements by representatives of members of the Security Council made at the time of their adoption, other resolutions of the Security Council on the same issue as well as the subsequent practice of relevant United Nations organs and of States affected by those given resolutions.' Still, as noted by the Permanent Court 'it is an established principle that the right of giving an authoritative interpretation of a legal rule belongs solely to the... body who has the power to modify or suppress it.'⁷⁶ This is to say that only the Security Council, or a body authorized to do so by the Council, has the authority to give an official interpretation of disputed terms in Security Council resolution 1973.

⁷⁵ Kosovo Declaration of Independence, para.94

⁷⁶ Jaworzina Advisory Opinion

While the International Court of Justice set forth factors applicable in the process of interpretation of Security Council resolutions, it did not refer to decisions of international courts. The Court has in a number of cases interpreted Security Council resolutions and clearly its decisions are relevant factors for interpretation. This indicates that the list of factors set forth by the Court is not intended to be a complete list of applicable factors. That the list of factors does not make an exhaustive list is supported by the vague language the Court uses to describe the relevant factors, by first merely making a reference to the rules in the Vienna Convention, Article 31 and 32, saying that these ‘may provide guidance’, then stating that the interpretation also requires ‘that other factors be taken into account’ and finally mentioning four factors that the interpretation ‘may require the Court to analyze.’

In the following, when interpreting resolution 1973, the factors of interpretation as set forth by the Court in its Kosovo Advisory Opinion, in addition to other relevant factors, will be clarified and applied.

The approach in Article 31(1) of the Vienna Convention suggests that the resolution shall be interpreted in accordance with ‘the ordinary meaning to be given to the terms of [the resolution] in their context and in the light of its object and purpose.’ What are to be considered as ‘the terms’ mentioned in Article 31 (1) are the unnumbered preamble paragraphs, the numbered operative paragraphs and the two annexes of resolution 1973. Distinction must be drawn between the preamble and the operative paragraphs, as only the latter are agreed upon to determine the rights and duties of the ones concerned. The operative paragraphs are thus of greatest importance. As resolution 1973 recalls resolution 1970 on the same matter, and the two have a combined effect of the situation in Libya, also resolution 1970 is included in the ‘terms’ of resolution 1973. In the Kosovo Advisory Opinion, the Court explicitly stated that such other resolutions on the same issue may be analyzed.

That the terms of resolution 1973 shall be interpreted in accordance with their ‘ordinary meaning,’ means in the common or literal sense of the words.

First, paragraph 4 authorizes Member States to take ‘all necessary measures’ – to use military force – ‘to protect civilians and civilian populated areas under threat of attack in the Libyan Arab Jamahiriya, including Benghazi’. The word ‘to’ is synonymous with ‘in order to’, ‘so as to’ and ‘so that’ and thus expresses purpose or intention. In paragraph 4 the word ‘to’ expressly links the use of all necessary measures with protection of civilians and civilian populated areas. An ordinary understanding of the phrase implies that paragraph 4 authorizes the use of all necessary measures – the use of armed force – when taken to achieve the purpose or intention of protection of civilians and civilian populated areas.

Importantly, the mandate here portrays a distinction between the measures to be used and the aim to be achieved. The mandate only licenses the use of all necessary measures to achieve the specified objective of protection. The scope of the use of armed force is thus limited to the objective that the use of force is designed to achieve; ‘to protect civilians and civilian populated areas under threat of attack..., including Benghazi’. The conduct of military operations to achieve other objectives or aims goes beyond paragraph 4 of Security Council resolution 1973 and would amount to an unlawful ‘threat or use of force’ against the targeted state, in breach of Article 2(4) of the Charter.

The next issue to address is the content of, and the internal relations between the objects of protection in paragraph 4, namely ‘civilians and civilian populated areas..., including Benghazi’.

The first object of protection is ‘civilians’. In the Oxford English Dictionary a ‘civilian’ is described as a person who is not professionally employed in the armed forces, that is to say a non-military person.

Further guidance as to who is covered by the term ‘civilians’ follows from Additional Protocol I of the Geneva Conventions. As Article 31(3) of the Vienna Convention suggests recourse to ‘any relevant rules of international law’ in the process of interpretation, provisions of international conventions as Additional Protocol I of the

Geneva Conventions may be taken into account.⁷⁷ The extent to which the terms of resolution 1973 may be interpreted taking into account the content given to similar terms in international law, depends on the intention of the Security Council, as demonstrated by the text of the resolution and the surrounding circumstances.⁷⁸ If it appears that the Security Council was intending to base itself on the content of a similar term in international law, the phrase shall be interpreted taken that content into account. Contrariwise, if the Council was intending to lay down some content regardless of the prior content of similar phrases, than that intention shall prevail.⁷⁹

Article 50 (1) of Additional Protocol I of the Geneva Conventions identifies a civilian as ‘any person who does not belong to... article 43 of this Protocol.’ Article 43, paragraph 2 decides that ‘members of the armed forces of a Party to a conflict are combatants.’ Armed forces of a Party to a conflict are defined in paragraph 1 of the article as to consist of ‘all organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates.’ As civilians are all but those covered by the term combatants, civilians are those who do not participate in the armed forces of any party of the conflict.

The residents of Benghazi and other areas of Libya who do not fight with the armed forces on either side of the conflict are therefore covered by the term ‘civilians.’ The rebel forces fighting against Qaddafi are however not covered by the term.

As resolution 1973 does not provide for a specific description of the term ‘civilians’ and thus does not seem to divert from the content the term is given in other rules of international law, the content set forth in Additional Protocol I supplements resolution 1973.

Paragraph 4 is not only about protecting civilians but also about protecting ‘civilian populated areas.’ The term shows that it is about protecting specific geographical zones

⁷⁷ The Statute of the International Court of Justice Article 38(1)(a)

⁷⁸ Wood (1998)

⁷⁹ Wood (1998)

or areas that contain civilians, which include cities and towns. The phrase allows for protection of such areas regardless of whether the attacks are being directed at civilians or at what would be legitimate military objects under international humanitarian law.⁸⁰ In principle the phrase allows for protection of those fighting at both sides of the war.

In its Kosovo Advisory Opinion, the Court also noted that guidance in the interpretation could be taken from ‘statements by representatives of members of the Security Council made at the time of their adoption,’ meaning in the Council meeting where the resolution was adopted.⁸¹ In his introduction of the draft resolution in the meeting where resolution 1973 was adopted, the representative of France said that the draft authorizes Member States to resort to all necessary measures ‘to protect civilians and territories.’⁸² By simply referring to territories instead of ‘civilian populated areas’ the statement of the French representative supports that the latter phrase is about protecting specific geographical zones.

The phrase ‘civilian populated areas’ thus extends the mandate from merely protecting civilians to authorize protection of all civilian populated territories and thus also cities and towns held by rebel forces.

Paragraph 4 further reads ‘including Benghazi.’ The word ‘including’ means to comprise or contain. The expression ‘including Benghazi’ seems to explicitly highlight that the coalition forces will focus on the protection of the city of Benghazi.

Article 32 of the Vienna Convention suggests that circumstances around the adoption of the resolution may provide guidance in the interpretation. Earlier on the day the resolution 1973 was passed, pro-Qaddafi forces had advanced within striking distance of the rebel-held city of Benghazi and the rebels asked for military protection.⁸³ On

⁸⁰ Akande (23March2011)

⁸¹ Kosovo Declaration of Independence para.94

⁸² UN Doc. S/PV.6498

⁸³ The Telegraph (18March2011)

state television Qaddafi promised a ruthless assault on the city.⁸⁴ ‘We will chase the traitors from Benghazi. Destroy their fortifications. Show them no mercy,’ Qaddafi said to his forces.⁸⁵

These circumstances created an urgent need for protection, especially of the city of Benghazi. By making a particular reference to the city of Benghazi in resolution 1973, the Security Council sends a clear message to Qaddafi. If Qaddafi does not pull back his forces from attacking Benghazi, the member states will use forcible measures to protect the city. The inclusion of the words ‘including Benghazi’ in the text of the resolution does not narrow the scope of the objects the resolution sought to protect. On the contrary, it especially underscores the urgent need to protect lives and to prevent further bloodshed about to occur in Benghazi.

Statements from members present in the meeting where resolution 1973 was adopted further shed light on the meaning of the phrase ‘including Benghazi.’⁸⁶ The representative of France said that the resolution authorizes measures ‘to protect civilians and territories, including Benghazi, that are under the threat of attack by Colonel Al-Qaddafi’s forces.’ By comprising Benghazi under the term ‘civilians and territories,’ the statement indicates that the city of Benghazi is among the territories to be protected by the mandate. Furthermore, the protection is needed due to the threat of attack posed by Qaddafi’s forces. The representative also underscored that ‘every hour and day that goes by means a further clampdown and repression for the freedom-loving civilian population, in particular the people of Benghazi.’⁸⁷ The representative of the UK, another of the contributors to the draft, focused on the urgent need for the resolution, as the Qaddafi-regime at the time were ‘preparing for a violent assault on a city of one million people that has a history dating back 2,500 years,’⁸⁸ referring to Benghazi.

⁸⁴ Evans (2011)

⁸⁵ Evans (2011)

⁸⁶ Kosovo Declaration of Independence para.94

⁸⁷ UN Doc. S/PV.6498

⁸⁸ UN Doc. S/PV.6498

In brief, the expression ‘to protect civilians and civilian populated areas..., including Benghazi’ thus comprises protection of all civilians, the city of Benghazi, as well as other cities and towns including Ajdabiya and Misrata.

Paragraph 4 states that NATO and its allies are only licensed to protect these objects when they are ‘under threat of attack.’ The next issue to be determined is thus whether these areas are ‘under threat of attack.’

The expression ‘under threat of attack’ shows that the mandate is not only about ending actual attacks, it reaches to protection of civilians under the mere threat of an attack. According to the Oxford English Dictionary, the noun ‘threat’ means pressure, danger or peril. It further denotes a ‘declaration of hostile determination...; a menace.’ The word ‘menace’ signifies ‘a declaration or indication of hostile intention, or of a probable evil or catastrophe; a threat.’ This indicates that a ‘threat’ involves a form of communication of a hostile intent, and that this communication must contain a reference to an evil or catastrophe.⁸⁹

Not every possible hostile communication will qualify as a threat. There must be an adequate connection between the communication of the hostile intention and the danger it signals. The text of the resolution does not specify whether the threat must be direct, obvious or imminent. As the text does not in itself set forth these requirements, it could indicate that such requirements are not necessary.

Other relevant factors may shed light on the content of the term ‘threat’ as used in Paragraph 4 of resolution 1973. According to Article 31(3) (c) of the Vienna Convention ‘any relevant rules of international law’ may provide guidance in the process of interpretation, which include provisions of the UN Charter. In Article 2(4) of the Charter, the term ‘threat’ is used in the context of ‘threat or use of force.’ The UN Charter has not in itself provided for a description of the term ‘threat.’⁹⁰ When speaking about a ‘threat’ in relation to Article 2(4) of the UN Charter in the Nuclear Advisory

⁸⁹ Stürchler (2007) p.37

⁹⁰ Wood (2009)

Opinion the Court used the words ‘declared readiness of a State to use force.’⁹¹ Also Stürchler, who has made an evaluation of the practice of states and the United Nations in respect of ‘threat’ in Article 2(4), emphasizes that in order for there to be a violation of Article 2(4), a state must ‘credibly communicate its readiness to use force in a particular dispute.’⁹² This communication may be expressed or implied.⁹³ Stürchler argues that ‘what matters is that the use of force is sufficiently alluded to and thereby increases the shared risk of military encounter,’ there is no requirement of certainty that force will be used or that it is imminent.⁹⁴

The extent to which the content of the term ‘threat’ as laid down in respect of Article 2(4) of the UN Charter provides guidance for the similar term ‘under threat’ in Security Council resolution 1973 depends on the intentions of the Security Council.⁹⁵ In the Security Council meeting where resolution 1973 was adopted, the representative of Colombia touched upon the content of the phrase ‘under threat of attack. Colombia underscored that it ‘voted in favor of measures that are aimed at protecting the civilian population from imminent attacks by a Government.’ By using the term ‘from imminent attacks’ instead of the expression ‘under threat of attack’ as in paragraph 4 of resolution 1973, the representative of Colombia implies that the mandate only covers situations where the attack is imminent. Phrases of similar content as imminent are ‘about or ready to happen,’ ‘near at hand in its incidence’ and ‘coming on shortly.’ The term ‘imminent attack’ thus significantly narrows the scope of situations the member states can react to compared to the term ‘under threat of attack.’ The importance of the statement of Colombia is limited as this is the sole state in the Council meeting that utters this point of view. However, it does shed some light on the content of the expression ‘under threat of attack’ in that a threat does not cover any possible attack in the future as some closeness to an attack must be established. Since the other members of the Council did not intend to deviate from the content of the technical term ‘threat’ in Article 2(4) of the UN Charter, and as to take guidance from this rule will promote

⁹¹ Nuclear Weapons para.47

⁹² Stürchler (2007) p.273

⁹³ Wood (2009)

⁹⁴ Stürchler (2007) p.273

⁹⁵ Wood (1998)

harmony in the legal framework on the field, the content given to the term ‘threat’ in Article 2(4) is relevant in the interpretation.

An ordinary reading of the term ‘under threat,’ with guidance taken from the term ‘threat’ in Article 2(4) of the UN Charter and to some degree the opinion of Colombia, indicate that the term ‘under threat of attack’ in paragraph 4 of resolution 1973 requires that a coercive intent to carry out an attack has been credibly communicated in some way, but it does not have to be definite that an attack will incur, nor does the attack need to be imminent. Even though imminence is not required, some form of adequate connection to an attack must be established.

The threat that paragraph 4 refers to is the incident of an ‘attack.’ The ordinary understanding of the word ‘attack’ implies a violent attempt to defeat, hurt or overcome somebody or something.⁹⁶

Other relevant rules of international law may provide guidance to the interpretation of the term ‘attack.’⁹⁷ Article 51 of the UN Charter uses the term ‘attack’ when stipulating that an ‘armed attack’ is a condition for the exercise of the right of self-defence. No definition for the concept of ‘armed attack’ can be found in the UN Charter. However in its Nicaragua case the Court remarked that one must distinguish ‘the most grave forms of the use of force (those constituting an armed attack) from other less grave forms.’⁹⁸ The Court also focused on the ‘scale and effects’ of an armed attack to distinguish it from a ‘mere frontier incident.’⁹⁹

These criteria of a certain graveness and the scale and effects of the force are set forth specifically for the narrow scope of armed operations that justifies the right of self-defence. Indeed, in its Nicaragua case the Court underscored that armed operations that qualify as a ‘use of force’ in Article 2(4) do not necessarily also qualify as an ‘armed

⁹⁶ Oxford English Dictionary

⁹⁷ Vienna Convention Article 31(3)(c)

⁹⁸ Nicaragua v USA, para.191

⁹⁹ Nicaragua v USA, para.195, Zemanek (2009)

attack’ in relation to Article 51.¹⁰⁰ The threshold of the term ‘armed attack’ is thus set quite high. Whether the content of the term ‘attack’, as laid down in paragraph 4 of resolution 1973, gives guidance on the term ‘attack’ in paragraph 4 of resolution 1973, depends on the intentions of the Security Council.

In the Council meeting where resolution 1973 was adopted, the majority of the representatives of member states emphasized that the purpose of the resolution was to protect civilians and end the violence inflicted on the Libyan civilians by Qaddafi. The representative of Lebanon hoped that the resolution would make ‘Libyan authorities move away from using all forms of violence against their own people’ and the South African representative said that the aim of the resolution was to protect those ‘who are faced with brutal acts of violence carried out by the Libyan authorities.’ The purpose of protecting civilians against all forms of violence, shows that the term ‘attack’ in paragraph 4 is not intended to be interpreted as strictly as in Article 51 of the UN Charter, but merely as referring to all forms of violence and harm the Qaddafi regime inflicts on the civilian population of Libya.¹⁰¹

The issue to determine is then whether the city of Ajdabiya, Misrata and Benghazi were ‘under threat of attack’.

In his speech on Libyan television on February 22 Qaddafi clearly communicated his coercive intent on attacking the rebels. Qaddafi referred to them as ‘cockroaches’ and vowed to fight to his ‘last drop of blood.’¹⁰² This speech showed that Qaddafi would fight against all rebels in Libya.

On March 16, the pro-Qaddafi forces had already surrounded and made their first attacks on the city of Ajdabiya.¹⁰³ In Misrata, by March 22 pro-Qaddafi forces had moved their armor into the city to make it harder to hit them from the air and the forces

¹⁰⁰ Nicaragua v USA, para.195

¹⁰¹ UN Doc. S/PV.6498

¹⁰² NYT (22February2011)

¹⁰³ BBC News (16March2011)

had snipers on rooftops and tanks in the city center.¹⁰⁴ The city had already been under attack for several days. Both the cities of Ajdabiya and Misrata were in fact already under attack, and it is thus clear that airborne actions by NATO and its allies striking at concentrations of forces in areas within and around the city were within the mandate of resolution 1973.

When it comes to Benghazi, Qaddafi had on March 17 explicitly communicated a vicious intent of attacking the city if the rebels did not surrender.¹⁰⁵ Seen in combination with the masses of armed forces advancing within striking distance of the city on the verge of storming the territory and with Qaddafi's record of violence against civilians there was clearly a risk of even an imminent attack on Benghazi.

A violent attack as envisioned by Qaddafi on the city of Benghazi and its one million people would possibly result in a number of casualties and civilians left without shelter and thus constitute as a grave attack.

The airstrikes conducted by NATO and its allies at the armed forces of Qaddafi advancing on Benghazi are thus within the mandate of resolution 1973.

In conclusion, airstrikes directed at tanks and columns of pro-government forces advancing on rebel-held areas, as well as concentrations of forces within those areas are justified within the scope of Security Council resolution 1973.

¹⁰⁴ The Guardian (22March2011)

¹⁰⁵ NYT (17March2011)

3.3.2 Airstrikes launched at strategic goals

The discussion will here address the legality of the military operations directed at strategic goals of importance for the Qaddafi regime's capability of command and control, conducted in phase two of the conflict. Among these military operations were the airstrikes on March 21 at Qaddafi's command center in Tripoli¹⁰⁶ and on April 25 at Qaddafi's Bab al-Azizia compound.¹⁰⁷

Paragraph 4 of resolution 1973 authorizes the use of armed force in pursuance of protecting 'civilians and civilian populated areas under threat of attack.'

As established under 3.3.1, in order for there to be a threat, a coercive intent must have been communicated in some way. During the uprising in Libya, Qaddafi made several speeches where he explicitly promised to use force against those who opposed him. Broadcasted on Libyan television on March 19, Qaddafi said he would arm all civilians to defend Libya from what he called 'crusader aggression' by Western forces.¹⁰⁸ In his speech Qaddafi also issued a warning of the danger to civilians in the whole region, when saying that 'the interests of countries face danger from now on in the Mediterranean because of this aggressive and mad behavior.'¹⁰⁹ The speeches of Qaddafi, as well as his demonstrated capability to use force since the war started and also his continued attacks on his own people showed that Qaddafi would not end the attacks. This thus amounts to a communicated threat of attack.

The airstrikes at the command and control centers raise the question of how remote the connection between the threat of attack and those posing it may be.¹¹⁰

¹⁰⁶ BBC News (21March2011)

¹⁰⁷ BBC News (25April2011)

¹⁰⁸ Reuters (19March2011)

¹⁰⁹ Reuters (19March2011)

¹¹⁰ Tzanakopoulos (2011)

The phrase ‘under threat of attack’ goes beyond the need to establish a definite link to an actual attack. As established under 3.3.2, even though imminence is not required, some form of adequate connection must be established between the threat of attack and those posing it. The wording ‘under threat’ does not only seem to permit military response to imminent or direct threats of attacks, also more distant and indirect threats appear to be covered by the mandate.¹¹¹ When the mandate seems to cover protection also against more indirect and remote threats, this includes operations that support, or reasonably could be expected to support, such attacks on the civilian population.¹¹²

In its Kosovo Advisory Opinion, the Court said that also ‘subsequent practice... of States affected by [the] given resolutions,’ is a relevant factor when interpreting resolutions.¹¹³ This is also emphasized in Article 31(3)(b) of the Vienna Convention. Not only actual practice should be considered in the interpretation but also the non-performance, the practice of not doing something that others do should be taken into account as also this kind of practice provides information on how the states understand the resolution. As the Court uses the word ‘practice’ and not ‘statement’ it indicates that it is the actual practice, or non-practice, in contrast to the opinion juris of states that is of interest. When considered together with the actual practice of the state, prior or succeeding statements may nevertheless enlighten the actual practice of the state and may thus be taken into account. ‘States affected’ by resolution 1973 are the states that are more or less involved in the situation in Libya, which necessarily includes states enforcing the mandate. UK, Norway as well as other states within the NATO alliance have launched airstrikes at pro-Qaddafi command and control centers,¹¹⁴ including TV satellite transmission dishes used for communication.¹¹⁵ Both UK and Norway have publicly expressed their opinion that these airstrikes were carried out within the mandate of resolution 1973.

¹¹¹ Henderson (2011)

¹¹² Schmitt (2011)

¹¹³ Kosovo Declaration of Independence para.94

¹¹⁴ The Guardian (19April2011)

¹¹⁵ NATO (30July2011)

UK Prime Minister David Cameron explained that the airstrikes are ‘about preventing a loss of civilian life by targeting Qaddafi's war-making machine,’¹¹⁶ which he said also covered command and control. The at the time Norwegian Minister of Defence, Grete Faremo, argued that the airstrikes at these command and control centres would break down Qaddafi’s ability to harm civilians, but not crush the regime.¹¹⁷ Faremo emphasized that these attacks were about weakening Qaddafi’s military capabilities, which he has used towards his own people.¹¹⁸ Faremo also emphasized that to break down the military capabilities of the regime was not the same as to crush the regime. The at that time Norwegian Secretary of State, Espen Barth Eide, underscored that the objective of the resolution was to protect civilians, and that to use military measures to achieve that Qaddafi resigned was not within the scope of the resolution.¹¹⁹

There might seem to be a contradiction in the statements of Faremo and Eide, in that on the one hand, military measures could not be used to force Qaddafi to resign, and on the other hand armed force could be used to eliminate Qaddafi’s military capabilities as these posed a threat against civilians. In both scenarios the military measures were directed towards the Qaddafi regime. However, to seek to eliminate the devices Qaddafi used in the attacks of his people and to remove of Qaddafi himself does not seem to be exactly the same. If one eliminated the war-making devises of Qaddafi that posed a threat on the civilian population, in consequence Qaddafi would no longer be able to attack his people. Then it would be for the Libyan people to decide whether Qaddafi should resign from power.

Also NATO has on several occasions uttered its opinion on the actions carried out by the alliance. Whether practice of NATO as a unit is relevant in terms of ‘subsequent practice of ... States affected by those given resolutions’ depends on the rules of engagement between NATO and the countries enforcing the mandate, i.e. in which degree the countries acting out the mandate may decide whether they want to participate

¹¹⁶ Independent (1May2011)

¹¹⁷ Klassekampen (26May2011)

¹¹⁸ Klassekampen (26May2011)

¹¹⁹ Klassekampen (31March2011)

on a particular operation or not. On March 28, Oana Lungescu, a spokesperson for NATO said that NATO would not go into the details on the rules of engagement, other than saying that all twenty eight allies agree to the rules.¹²⁰ The rules of engagement are thus not known for the public. Nevertheless, NATO is in command of the military operations enforcing resolution 1973 in Libya and makes a forum for the member states to discuss the military operation. When representatives of NATO make announcements, it is on behalf of its member states. The practice of NATO is thus of relevance as a factor of interpretation.

With regard to the targeting of the communicational infrastructure and the headquarters of Qaddafi, Lieutenant-General Charles Bouchard stated that ‘NATO will continue its campaign to degrade the Qaddafi regime forces that are involved in the ongoing attacks on civilians.’¹²¹ The NATO alliance has also announced that NATO's strategy of launching strikes at these centers has been to disrupt and destroy the command and control of those forces.¹²² NATO thus opinions, in similar language as the UK and Norway, that airstrikes directed at command and control centers are within the objective of the mandate of civilian protection as these centers are involved in operations that put the civilian population at risk.

While these countries continued the airstrikes at command and control centers, both Russia and China expressed concern about NATO's perceived military overreach. Russia and China did not participate in the enforcement of resolution 1973 and were therefore not directly ‘affected’ by the resolution. However, as permanent members of the Security Council, the two countries had the opportunity to give a negative vote on the draft resolution, i.e. to veto the draft and thus avert the resolution from being passed.¹²³ Being in a substantial degree of control over the adoption of the resolution, the permanent members should be regarded as affected by the resolution even when not participating in its enforcement. The subsequent practice of China and Russia is

¹²⁰ NATO (2011), *press briefing on events related to Libya*

¹²¹ Reuters (19April2011)

¹²² The Guardian (1May2011)

¹²³ UN Charter Article 27(3)

therefore of importance. On April 15, the day after the allies met and discussed the military operations in Libya on the Berlin conference, as a warning to the alliance not to use excessive force, the Russian Foreign Minister, Sergei Lavrov, underscored that ‘The UN has not authorized regime change.’¹²⁴ NATO Secretary-General, Rasmussen, quickly responded that NATO's forces were acting ‘in strict conformity with both the spirit and the letter of the UN Security Council motion’¹²⁵ and that NATO would continue its precision bombing raids.¹²⁶

The countries that were debating the legality of airstrikes directed at Qaddafi’s command and control centers seemed to be divided, as one group argued that the airstrikes were conducted to protect the civilian population, while the opposition argued that the airstrikes were directed towards a regime change.

As underscored by Norway, the UK and NATO, the actual use of the command and control centers facilitated communication and military orders between Qaddafi’s forces. These centers thus made an effective contribution on Qaddafi’s military capabilities to attack his own people. Wiping out the command and control centers would weaken the coordination of the pro-Qaddafi forces, and thus the threat these posed on the civilian population. As the command and control centers were involved in operations that put the civilian population at risk, these centers themselves posed an indirect threat on the Libyan population. Eliminating these centers was not about removing Qaddafi, but about reducing his devices for attacking civilians.

The discussion thus shows that the command and control centers are sufficiently connected to the threat of attack on the civilian population in Libya. The airstrikes launched at these devices are within the objective of paragraph 4 of resolution 1973.

¹²⁴ Time (16April2011)

¹²⁵ Time (16April2011)

¹²⁶ Time (16April2011)

In conclusion, airstrikes directed at strategic goals of importance for the Qaddafi regime's capability of command and control are justified within the scope of Security Council resolution 1973.

3.3.3 Airstrikes directed at Qaddafi's forces as the rebels advanced

The thesis will now address the legality of the airstrikes carried out by the coalition forces as the rebels advanced on Qaddafi-held territories, including Tripoli, Bani Walid and Sirte, phase three.

Paragraph 4 of resolution 1973 only permits military operations taken in order 'to protect civilians and civilian populated areas under threat of attack.' Forcible measures cannot be used in pursuance of other objectives.

On the one hand, in paragraph 2 of resolution 1973 the Council underscores the need to find a solution to the crisis which 'responds to the legitimate demands of the Libyan people.' The Council was certainly aware of that the demands of the people of Libya, especially the rebels, were for Qaddafi to resign and instead to have a regime that respects human rights. Moreover, Security Council resolutions 1970 and 1973 do in several of the preamble paragraphs deplore and condemn the violations of human rights in Libya and the failure of the Libyan authorities to protect its own people. On the other hand, neither in paragraph 2 nor in the preamble paragraphs is it specified that Qaddafi should resign. Moreover, paragraph 4 which licenses the use of forcible measures does not specify as an aim to make Qaddafi resign and secure regime change. A regime change may be the effect of permissible military action pursuant to resolution 1973 but it cannot be the objective for military operations.¹²⁷

When interpreting Security Council resolutions authorizing the use of armed force under Chapter VII resort should be taken to the lotus principle, asserting that limitations on sovereignty shall not be presumed.¹²⁸ Thus Security Council resolution 1973 should be interpreted strictly to its objective of civilian protection.

¹²⁷ Evans (2011)

¹²⁸ The Charter of the United Nations, a Commentary (2002) p.713

Both the UN Secretary-General as well as several of the member states implementing resolution 1973 has spoken on the objective of the mandate. In its Kosovo Advisory Opinion the International Court of Justice mentioned ‘subsequent practice of relevant United Nations organs’ as a relevant factor of interpretation.¹²⁹ The Secretary-General Ban Ki-moon, an organ of the UN, had on a number of occasions expressed his opinion on the aim of resolution 1973. In an encounter with journalists on March 24, the Secretary-General said that resolution 1973 was not aiming for regime change but to protect civilians ‘because Colonel Qaddafi has been killing his own people.’¹³⁰ On April 13, on the meeting of the International Contact Group on Libya, Ban Ki-moon repeated that the paramount objective throughout the Libyan crisis had been ‘to protect civilians from violence perpetrated by their own government.’¹³¹ The subsequent practice of the Secretary-General Ban Ki-moon underscored that the aim of the resolutions was to protect civilians against the violence perpetrated by the Libyan Government, not to change the regime.

As the Court mentioned in its Kosovo Advisory Opinion, also the subsequent practice of states affected by the resolution is a relevant factor of interpretation. On the question of whether defeating Qaddafi was allowed if this was the most effective way to protect civilians, Eide answered that Norway was of the opinion that Qaddafi had lost the legitimacy to rule and that a majority rule would be easier if he resigned or if someone forced him to resign.¹³² Nevertheless, Eide underscored that the coalition did not have the mandate to do so.¹³³

The President of South Africa, Zuma, has throughout the NATO operation held that the bombing in Libya should be ended and that the NATO forces have been seeking a regime change in Libya in an unacceptable manner.¹³⁴ Also the African Union opinions

¹²⁹ Kosovo Declaration of Independence para. 94

¹³⁰ UN News Centre (24March2011)

¹³¹ UN News Centre (13April2011)

¹³² Klassekampen (6May2011)

¹³³ Klassekampen (6May2011)

¹³⁴ NRK (9September2011)

that the military operation carried out in Libya is in contradiction of its original mandate. The African Union thus opinions that the military operation carried out in Libya is in contradiction of its original mandate. The African Union held a special session on Libya on May 25 and demanded ‘an immediate pause in the fighting and in the NATO-led air campaign.’ ‘In this respect, the Assembly is of the well-considered view that the continuation of the NATO-led military operation defeats the very purpose for which it was authorized in the first place, i.e. the protection of the civilian population, and further complicates any transition to a democratic dispensation in Libya.’¹³⁵

In the midst of the ongoing debate on whether NATO and its allies acted in violation of the Security Council mandate, on April 14 2011 President Barack Obama of the US, President Nicolas Sarkozy of France and British Prime Minister David Cameron published a joint article in several newspapers. The three state leaders pledged that NATO would protect civilians and stated that ‘so long as Qaddafi is in power, NATO must maintain its operations so that civilians remain protected and the pressure on the regime builds’. They acknowledged that ‘our duty and our mandate under U.N. Security Council Resolution 1973 is to protect civilians, and we are doing that. It is not to remove Qaddafi by force.’ Nevertheless, they claimed that ‘it is impossible to imagine a future for Libya with Qaddafi in power’¹³⁶ and that a genuine transition from dictatorship to an including constitutional process could first really begin when Qaddafi had resigned, led by a new generation of leaders.¹³⁷ They further stressed that ‘it will be the people of Libya, not the UN, who choose their new constitution, elect their new leaders and write the next chapter in their history.’¹³⁸

Indeed, when making statements, state leaders are often cautious in their language and they may not always use legal language in their assessment of the justification for a use

¹³⁵ EXT/ASSEMBLY/AU/DEC/

¹³⁶ Obama (14April2011)

¹³⁷ DN (15April2011)

¹³⁸ Obama (14April2011)

of force.¹³⁹ Legally speaking the state leaders does acknowledge that the objective under resolution 1973 is to protect civilians against the Qaddafi regime. However, politically, all three see Qaddafi's resignation as the only solution to the conflict and thus NATO will continue its operations until Qaddafi resigns. The joint article, thus seems to contain a contradiction as even though the mandate does not allow them to remove Qaddafi by force, NATO will 'continue its operations so that civilians remain protected and the pressure on the regime builds', operations that will include use of force. In the statements above, the three state leaders acknowledge that the mandate does not allow for the removal of Qaddafi by force.

In brief, the subsequent practice of the Secretary-General and the affected states seems to agree that the objective of the resolution is strictly to protect the civilian population, while some of them has politically uttered that Qaddafi must resign.

Whether the military airborne action carried out while the rebels advances on Qaddafi-held territory is within the mandate again raises the question as to how remote the connection between the threat of attack and those posing it may be. Even though the mandate seems to also permit responses to more indirect and distant attacks, an adequate connection must be established between the threat of attack and those posing it.

Could the regime of Qaddafi be said to pose a persistent threat against the civilian population? Indeed, Qaddafi had insistently promised to fight to the end. Again on September 1 2011, casted on an Arabic satellite channel, Qaddafi warned the alliance from further warfare and held that he would never surrender.¹⁴⁰ On the other side, the linkage to the threat of attack on the civilian population was not so apparent when it came to providing assistance to rebel forces in their effort to conquer Qaddafi held territory.

¹³⁹ Gray (2008) p.19

¹⁴⁰ NRK (9January2011)

The factual situation when the allies launched airstrikes as the rebels advanced on new areas was that the allies assisted the rebels in taking these areas from Qaddafi's forces. Even though Qaddafi had promised to attack the rebels, it was in fact Qaddafi's forces that were being attacked when the rebels advanced. Actually, when the rebels advanced on the Qaddafi held areas, the rebels themselves posed civilians and civilian populated areas under threat of attack. To assist the rebels would hence be to act in contradiction to the mandate of paragraph 4 of resolution 1973.

What NATO could have done instead of providing assistance for the rebels when these advanced on Qaddafi-held territories was to confine itself principally to standing by and attacking whenever civilians or civilian populated areas were being put at risk.

In conclusion, the airstrikes carried out while the rebels advanced on Qaddafi-held territories constitute a breach of resolution 1973 and are therefore illegal.

3.4 Does Security Council resolution 1973 permit the coalition to arm the Libyan rebels?

In the end of March 2011 the question of whether or not resolution 1973 allowed countries to arm the Libyan rebels became pressing as the rebels struggled to overpower Qaddafi's tanks and rockets.¹⁴¹ Both the US and the UK argued that providing arms for the rebels would not be in breach of the arms embargo imposed by Security Council resolution 1970, while the NATO Secretary General said that resolution 1973 did not permit the coalition to arm the rebels.¹⁴² In June the French newspaper *Le Figaro* reported that France had dropped a wide variety of weapons to support the rebels, including rocket launchers and anti-tank missiles. France confirmed that it had provided weapons to rebels in Libya fighting against Qaddafi's forces.¹⁴³ The armed forces spokesman, Thierry Burkhard, speaking on behalf of France said that France 'dropped arms and means of self-defence, mainly ammunition' and described the arms as 'light infantry weapons of the rifle type.'¹⁴⁴ This disclosure resumed the discussion of whether supplying the rebels with arms was within the scope and limits of resolution 1973.

Whether the supply of arms for the rebels by the allies was legal or not, is governed by the prohibition on the threat or use of force in Article 2(4) of the UN Charter, the customary rule of non-intervention and Security Council resolution 1973. In its *Nicaragua* case the International Court of Justice decided that the arming of insurgents in a civil strife constitutes a breach of the general prohibition on the use of force¹⁴⁵ and is also in breach of the rule of non-intervention.¹⁴⁶ Absent an authorization in the Security Council resolution 1973 permitting the coalition forces to supply arms to the

¹⁴¹ SkyNews (31March2011)

¹⁴² BBC News (30March2011)

¹⁴³ BBC News (29June2011)

¹⁴⁴ BBC News (29June2011)

¹⁴⁵ *Nicaragua v USA*, para.228

¹⁴⁶ *Nicaragua v USA*, para.241,242

Libyan rebels, the supplies of arms would be in violation of both the prohibition on the threat of force in Article 2(4) of the UN Charter and the rule of non-intervention.

The issue to address is whether Security Council resolution 1973 permits arming the rebels in the civil war.

The concrete legal basis for the discussion is paragraph 4 of resolution 1973 which authorizes the use of ‘all necessary measures, notwithstanding paragraph 9 of resolution 1970 (2011), to protect civilians and civilian populated areas under threat of attack in the Libyan Arab Jamahiriya.’

While paragraph 4 authorizes all necessary measures, i.e. the use of armed force, in order to achieve the objective of civilian protection, there is at the same time an arms embargo on the Libyan Arab Jamahiriya. The arms embargo is initially established by paragraph 9 of resolution 1970 which stipulates that all the member states of the UN shall ‘take the necessary measures to prevent the direct or indirect supply, sale or transfer to the Libyan Arab Jamahiriya ... of arms and related materiel of all types.’¹⁴⁷ With this provision the Council effectively imposes an arms embargo on the whole territory of Libya, preventing any transfer of arms into the territory of the country. The provision does not only prevent transfers to the loyalists of the Qaddafi regime, it covers everybody in Libya.

Although the established arms embargo is continued and provided stronger enforcement for in paragraphs 13-16 of resolution 1973, paragraph 4 of resolution 1973 makes a specific reference to the arms embargo when it authorizes member states to take ‘all necessary measures... notwithstanding paragraph 9 of resolution 1970 (2011), to protect civilians and civilian populated areas under threat of attack in the Libyan Arab Jamahiriya.’

The word ‘notwithstanding’ is in Oxford English Dictionary explained as to be of the same substance as ‘in spite of,’ ‘although,’ ‘nevertheless’ and ‘all the same’. A textual

¹⁴⁷ UN Doc. S/RES/1970, para.9

reading of the phrase ‘notwithstanding paragraph 9 of resolution 1970’ in paragraph 4 implies that it authorizes the allies to take all necessary measures, in spite of the arms embargo imposed on Libya by paragraph 9 of resolution 1970. The text of paragraph 4 thus seems to deviate somewhat from the general arms embargo established in paragraph 9 of resolution 1970.

Regardless of the phrase ‘notwithstanding paragraph 9 of resolution 1970,’ paragraph 4 of resolution 1973 authorizes member states to take ‘all necessary measures,’ i.e. armed force, in pursuance of civilian protection. The license for the member states to use forcible measures necessarily implies that the allies use their own weapons within the territory of Libya, which includes Libya’s airspace and territorial waters.¹⁴⁸ Indeed, if the states carrying out the mandate were not permitted to bring their own arms for their own use into the territory of Libya, then the license to use all necessary measures would be meaningless. The authorization to use armed force thus implicitly makes an exception from the general arms embargo, permitting the allies to bring their own weapons for own usage into Libya.

When the Council in paragraph 4 licenses the use of armed force in the broad phrase of ‘all necessary measures’ to achieve civilian protection, it does not only make an exception from the general rules on non-intervention and the prohibition on the use of force, it also constitutes an exception from the specific provisions on the arms embargo initially established in paragraph 9 of resolution 1970, and then reinforced in resolution 1973. This implies that the resort to armed force is allowed only in the degree that it is restrictively directed towards the objective of civilian protection.

As a relevant factor in the process of interpreting Security Council resolutions, the International Court of Justice in its Kosovo Advisory Opinion mentions ‘other resolutions of the Security Council on the same issue.’ This clearly includes other resolutions on the situation in Libya. However, the interpretation factor seems to not only cover resolutions on the precise same crisis, but also resolutions of similar substances. The interpretation of past resolutions concerning similar legal issues could

¹⁴⁸ Akande (31March2011)

shed light on how related constructions in other resolutions are to be understood. On the other hand, in the political tug of war in which a draft resolution is made, the Council more often focuses on political aims than on the need for consistency from resolution to resolution. This, as well as the obvious fact that all actual situations differ from each other, means that when looking at the interpretation of earlier resolutions due caution must be taken.

The interpretation of the relation between the established arms embargo under Security Council resolution 733 (1992) on Somalia and resolution 794 (1992) can shed light on the interpretation of resolutions 1970 and 1973 on Libya.¹⁴⁹ Even though Security Council resolution 733 (1992) imposed ‘a general and complete embargo on all deliveries of weapons and military equipment to Somalia,’ it was implicitly modified by resolution 794 (1992) which authorized the use of ‘all necessary means to establish... a secure environment for humanitarian relief’.¹⁵⁰ Despite the arms embargo established in resolution 733, the two resolutions seen in combination did not forbid the states which implemented the mandate in resolution 794 to bring their own arms for their own use into the territory of Somalia.¹⁵¹

The interpretation of the legal framework in Somalia suggests that when the Security Council authorizes the member states to take enforcement action under resolution 1973 on Libya, the general arms embargo does not apply to the member states when carrying out the mandate.

The text of resolution 1973, its purpose as well as the interpretation of the Council’s resolutions on Somalia, show that the arms embargo in paragraph 9 of resolution 1970 does not apply to member states when acting within the mandate of the Council.

Even if the allies can bring their own arms for their own use, can they also provide the rebels with arms?

¹⁴⁹ Akande (31March2011)

¹⁵⁰ Akande (31March2011)

¹⁵¹ Akande (31March2011)

Under international law, as acknowledged by the Court in its Nicaragua case, force can be used directly, through the state's own forces, or indirectly, in the manner of providing assistance to non-state actors.¹⁵² Paragraph 4 of resolution 1973 explicitly directs the authorization to use all necessary means to 'Member States... acting nationally or through regional organizations or arrangements'. Pursuant to the resolution, states can thus operate alone, in an ad hoc coalition, through a regional organization such as NATO or in a combination of these.¹⁵³ Paragraph 4 does not specify whether the member state's resort to armed force must be conducted by the member state itself or if the member state can use force indirectly, in the form of assistance by supplying arms. When it is acknowledged that force may be taken both directly or indirectly in international law, and the mandate in paragraph 4 does not limit the use of force to directly be taken by the state, such a limitation should not be interpreted into the text.

The limitation the paragraph does in fact impose is that the use of force must be directed at aiming the objective of civilian protection. Not only the direct use of force but also to use force indirectly, may be taken to achieve the objective. Thus also the use of indirect force is allowed for in paragraph 4 of resolution 1973.

In its Kosovo Advisory Opinion the Court also acknowledged the importance of the interpretation of a resolution and the discussions of the member states in the Council meeting where the resolution was adopted. In the Council meeting where resolution 1973 was adopted none of the countries debated the possibility of providing arms for the rebels. However, a number of states expressed that any armed intervention should be limited. South Africa generally urged that the resolution should 'be implemented in full respect for both its letter and spirit,' and the countries which absented from the vote all took a highly restrictive approach to any form of armed intervention in Libya. The opinioned views of a limited military intervention indicate that a narrow approach to the interpretation of the mandate should be taken, and thus that resolution 1973 did not

¹⁵² Nicaragua v USA para.206,209

¹⁵³ Schmitt (2011)

intend to permit for an exception from the general arms embargo in order to provide weapons to the rebels.

In its Kosovo Advisory Opinion, the Court further included as a relevant factor in the interpretation of resolutions the ‘subsequent practice... of States affected by [the] given resolutions.’ Only Qatar and France, states enforcing the mandate of resolution 1973, have admitted to arming the rebels.¹⁵⁴

The prime minister of Qatar, Sheikh Hamas bin Jassem, held that UN resolution 1973 permits the supply of ‘defensive weapons’ to the opposition forces in Libya. The Qatari government did not want to elaborate in detail on the arms deliveries, but said that the weapons provided for the rebels were ‘equipment so they can defend themselves.’¹⁵⁵ French Permanent Representative to the UN, Gerard Araud, explained the French air drops of weapons in similar words as Qatar, emphasizing that the air drops concerned weapons of self-defence ‘to the civilian populations because we considered these populations were under threat.’¹⁵⁶ Although the media reported that France had also dropped rocket launchers, which are especially used as offensive weapon,¹⁵⁷ France has not made any comment on this.

Both Qatar and France underscored that the arms provided for were mainly arms of self-defence, which made it seem as if the two countries legalized the arm drops in that it was done to achieve the objective of resolution 1973, to protect civilians and civilian populated areas under threat of attack.

Even though the UK and the US have not provided weapons to the rebels, both have uttered their support of the decision of Qatar and France to arm the rebels and argued that to arm the rebels was legal. In March, US Secretary of State, Hillary Clinton, argued that although UN sanctions prohibited the delivery of arms to Libya, the ban no

¹⁵⁴ The Guardian (14April2011)

¹⁵⁵ The Guardian (14April2011)

¹⁵⁶ Middle East Online (30June2011)

¹⁵⁷ Oxford English Dictionary

longer applied. 'It is our interpretation that [resolution] 1973 amended or overrode the absolute prohibition on arms to anyone in Libya,' she said.¹⁵⁸ US President, Barack Obama, supported the view presented by Clinton when stating that he did not rule out arming the rebels seeking to overthrow Qaddafi.¹⁵⁹ The US thus opinioned that the text in paragraph 4 resolution 1973 in general amended the initial arms embargo.

On the reading of the two resolutions the UK Foreign Secretary, William Hague, held in March that even though the arms embargo applied to the whole of Libya, it 'might allow equipment to be given to people purely to defend themselves in certain circumstances in a limited way.'¹⁶⁰ After becoming aware that France had armed the rebels, a spokesman of the British Foreign Office said that 'There is an arms embargo in Libya. At the same time UN resolution 1973 allows all necessary measures to protect civilians and civilian populated areas... We think that the United Nations resolution allows in certain limited circumstances defensive weapons to be provided'.¹⁶¹ Similar to the US, the UK focused on that the text of paragraph 4 provided for an exception from the arms embargo.

Nevertheless, Russia and China, the key permanent members whose non-opposition to resolution 1973 was crucial to its passage, as well as NATO and Norway, have opinioned that arming the rebels was not within the scope of resolution 1973.

When the Russian Foreign Minister, Sergei Lavrov, was confronted with the arms supply by France, he said that 'if this is confirmed, it is a very crude violation of UN Security Council resolution 1970 [which imposes an arms embargo on Libya]'.¹⁶² In response to the same confrontation, Chinese Foreign Ministry spokesman, Hong Lei, called 'on the international community to strictly follow the spirit of the relevant resolution of the U.N. Security Council and avoid taking any action that goes beyond

¹⁵⁸ The Guardian (29March2011)

¹⁵⁹ BBC News (30March2011)

¹⁶⁰ SkyNews (31March2011)

¹⁶¹ The Guardian (29June2011)

¹⁶² BBC News (30June2011)

the mandate of the resolution.’¹⁶³ While not criticizing France explicitly, it was evident from Hong Lei’s response that China disapproved of France’s arming of the Libyan opposition.

On a question of whether Security Council resolution 1973 permits the coalition forces to arm the Libyan rebels, NATO Secretary-General, Rasmussen answered that ‘we are not in Libya to arm people. We are in Libya to protect civilians against attacks.’¹⁶⁴ The Norwegian Minister of Defence, Faremo, emphasized that the UN mandate was about protecting civilians and that supplying the rebels with arms was thus out of the question.¹⁶⁵ She furthermore underscored that due to the arms embargo on the whole territory of Libya it was not allowed to transfer weapons to the country.¹⁶⁶

Using the argument of the overriding aim of civilian protection in a complete opposite standing compared to how Qatar and France argued, the NATO Secretary-General and Norway emphasized that the overall aim of civilian protection in the resolution indicated that arming of rebels was outside the scope of the mandate.

Even though the intention of some members of the Security Council indicates that the resolution should be interpreted strictly, the text of resolution 1973 does not in itself exclude indirect use of force, including assistance by providing arms. Furthermore, as NATO, Norway, France and Qatar seemed to emphasize that what is determinative for the legality of arming the rebels is the objective of civilian protection, as arming the rebels is not necessarily an excluded measure under paragraph 4 of resolution 1973. Nevertheless, any supply of arms to the rebels is indeed limited by the objective in paragraph 4 of resolution 1973.

Paragraph 4 authorizes forcible measures directed solely towards the protection of ‘civilians and civilian populated areas under threat of attack.’ Any supply of arms to the

¹⁶³ ABC News (30June2011)

¹⁶⁴ BBC News (30March2011)

¹⁶⁵ Dagsavisen (30March2011)

¹⁶⁶ Klassekampen (31March2011)

rebels must thus be conducted to achieve the objective of civilian protection. To supply the rebels with arms in pursuance of other aims is not permitted by paragraph 4 of resolution 1973. Any supply of arms directed at other aims will be in violation of the general arms embargo established in paragraph 9 of resolution 1970 as well as the rule of non-intervention and the prohibition on the use of force in Article 2(4) of the UN Charter.

The issue to be discussed is thus if arming the rebels is directed towards protection of ‘civilians and civilian populated areas under threat of attack.’

Weapons in general are regarded as instruments used in warfare or combat to attack or overcome an enemy.¹⁶⁷ Hardly any weapons can be used only for defensive purposes. Also the kind of light infantry weapons, as the rifle, that France supplied the rebels with, can be used for offensive purposes.

The chairperson of the African Union, Jean Ping, has been highly negative to France’s decision to air-drop weapons to Libyan rebels. In its Kosovo Advisory Opinion, the Court did not mention the practice of regional organizations such as the African Union as a relevant factor of interpretation. However, as the Court did not make an exhausted list of factors, also other factors might be relevant. In resolution 1973 the Security Council took note of the condemnation of, and the communiqué of the Peace and Security Council of the African Union on the situation in Libya, which shows that the Council emphasizes the opinion of the African Union on the situation in Libya. This is further supported by the speeches of the member states in the Council meeting where resolution 1973 was adopted, where a majority of the states which spoke of the resolution commended the importance of the work of the African Union on the situation in Libya. This shows that also practice combined with prior or subsequent statements of representatives who speak on behalf of the African Union is relevant in the interpretation of the resolutions on Libya.

¹⁶⁷ Oxford English Dictionary

Ping explained the disapproval of the Union in respect of the supply of arms for the rebels in Libya in terms of the negative effect such a supply might have. Ping held that weapons distributed in Libya would put the whole region at risk'¹⁶⁸ and contribute to the 'destabilization' of African states. Ping said that 'what worries us is not who is giving what, but simply that weapons are being distributed. By all parties, and to all parties.' Ping further claimed that the weapons distributed to the rebels were already reaching al-Qaeda and traffickers.¹⁶⁹ In fact the coalition has admitted that it was not clear who the Libyan opposition group was or that some of the opposition fighters had al-Qaeda links.¹⁷⁰

On the one hand, a supply of weapons will aim at the objective of civilian protection when the rebels use these to defend the areas they are in control of from attacks by Qaddafi's forces. On the other hand, when the arms have been distributed to the rebels in the purpose of civilian protection, the allies are no longer in control of what purposes those arms are then used to achieve. The weapons provided for in the intention of defensive usage, can be used also for offensive purposes, and might even come into the hands of other non-state groups. The weapons could, and most likely would, be used by the rebels when these advance on cities held by Qaddafi's forces. In this case, it is the rebels themselves who pose a threat of attack on civilians and civilian populated areas, which the member states of the UN have a mandate to halt.¹⁷¹ The weapons are then used for offensive purposes and do no longer serve the aim of civilian protection. This discussion shows that to supply the rebels with arms does not improve the objective of civilian protection and thus goes beyond the mandate of paragraph 4 in resolution 1973.

In conclusion, Security Council resolution 1973 does not permit the coalition to arm the Libyan rebels. The supply of arms to the rebels is thus illegal.

¹⁶⁸ BBC News (30June2011)

¹⁶⁹ The Guardian (29June2011)

¹⁷⁰ The Telegraph (25March2011)

¹⁷¹ Akande (31March2011)

3.5 Does Security Council resolution 1973 permit the coalition to deploy ground forces in Libya?

In March 2011 President Obama of the US stated that he had no intention of sending ground combat troops into Libya.¹⁷² Also NATO Secretary-General, Rasmussen, has said that NATO will not deploy ground troops in Libya and has uttered that Security Council resolution 1973 does not authorize the use of forces on the ground.¹⁷³

Nevertheless, newspapers report about CIA teams,¹⁷⁴ British agents, Special Forces and military experts and advisors operating on Libyan territory.¹⁷⁵

Both the prohibition on the use of force in international relations in Article 2(4) of the UN Charter and the customary rule on non-intervention in internal affairs forbid the deployment of foreign ground forces in the territory of another state. Without an authorization in Security Council resolution 1973 permitting the member states to position foreign armed forces on Libyan territory, such an operation would be in breach of the rule on non-intervention and the prohibition in Article 2(4) of the UN Charter.

The thesis will now address whether Security Council resolution 1973 permits the use of foreign ground forces on Libyan territory.

Paragraph 4 of resolution 1973 authorizes ‘all necessary measures to protect civilians and civilian populated areas under threat of attack in the Libyan Arab Jamahiriya... while excluding a foreign occupation force of any form on any part of Libyan territory.’ The provision explicitly excludes the measure of ‘a foreign occupation force of any form’ from the authorization to use forcible measures. An ordinary reading of the clause indicates that it does not prohibit any kind of trans-frontier armed ground forces, only those which qualify as an ‘occupation force.’ The text of resolution 1973 does not provide for a definition of the implemented term ‘occupation force.’

¹⁷² FoxNews (23March2011)

¹⁷³ Euronews (28March2011)

¹⁷⁴ CBC News (7April2011)

¹⁷⁵ CBS News (21April2011), The Guardian (31March2011)

Article 31(3) of the Vienna Convention recognizes that other relevant rules of international law may be taken into account in the process of interpretation. International humanitarian law, more specifically Article 42 of the Hague Regulations, sets forth two criteria for a military operation to qualify as an ‘occupation’ for the purpose of the provisions of the Hague Regulations.

The first condition is that the territory has been ‘placed under the authority of the hostile army.’ The former government hence no longer exercises its authority of that area.¹⁷⁶ The second condition is that ‘authority has been established and can be exercised’ over the territory. An ordinary understanding of the phrase indicates a requirement of actual establishment of authority. In respect of this second condition, the International Court of Justice in its case *Armed Activities case* placed emphasis on that the Ugandan forces had exercised authority in the Ituri Province of DRC, thus Uganda was an occupying power there.¹⁷⁷

Responsibilities attach to occupying forces at the time of occupation, as for example the duty to restore and maintain public order pursuant to Article 43 of the Hague Regulations. As Judge Kooijmans of the Court highlighted in his separate opinion on the *Armed Activities case*,¹⁷⁸ an invading army cannot avoid its obligations derived of being the occupying power merely by refraining from actually exercising authority in the area it is in control of.¹⁷⁹ For the occupying force to carry out these responsibilities it is sufficient that it has the effective, factual control or authority over the area, it is not essential that it has established an authority on the area.

At least in relation to the obligations under Geneva Convention IV and Additional Protocol I it is widely accepted that the obligations of forces present in an armed conflict in a foreign territory do not depend on whether or not the forces actually

¹⁷⁶ Benvenisti (2009)

¹⁷⁷ *DRC v. Uganda*, para.174-178

¹⁷⁸ *DRC v. Uganda*, Separate opinion of Judge Kooijmans, para.36–64

¹⁷⁹ Roberts (2009)

exercise public authority there.¹⁸⁰ It is generally accepted that it is sufficient that the occupying force has effective control over the territory.¹⁸¹ Effective control simply entails that the occupying force is able to exercise its authority in the occupied area, it does not have to be present there at all times.¹⁸²

In brief, the regime of military occupation thus refers to a situation where the armed forces of one or more states exercise effective control over the territory of another state, absent the consent of the former state's government.¹⁸³

The extent to which the content of the technical term 'occupation', given in respect of the Hague Regulations, provides guidance in the interpretation of the similar term in resolution 1973, depends on the intentions of the Security Council.

Also statements by representatives in the meeting where the resolution was adopted are a recognized factor of interpretation.¹⁸⁴ A number of the representatives in the meeting commented on the term 'a foreign occupation force.'

The representative of Lebanon underscored that the resolution 'will not result in the occupation of any part of Libyan territory,' while the spokesman of Colombia stressed that Colombia did not vote in favor of 'the occupation of a State'.¹⁸⁵ Further, the representative of Nigeria maintained that 'foreign occupation is not an option to secure peace in Libya' and that resolution 1973 specifically excludes that possibility.¹⁸⁶ The shared view of these countries is thus that foreign occupation is out of the question, but their statements did not provide further guidance of the exact content of a 'foreign occupation force'.

¹⁸⁰ Benvenisti (2009)

¹⁸¹ Benvenisti (2009)

¹⁸² Benvenisti (2009)

¹⁸³ Benvenisti (2009)

¹⁸⁴ Kosovo Declaration of Independence, para.94

¹⁸⁵ UN Doc.S/PV.6498

¹⁸⁶ UN Doc.S/PV.6498

The representative of Russia uttered that the draft was transcending the initial concept as submitted by the League of Arab States and that ‘provisions were introduced into the text that could potentially open the door to large-scale military intervention.’¹⁸⁷

Contrariwise to the statement of the representative of Russia, the delegation of South Africa stated that the resolution ‘rejects any foreign occupation or unilateral military intervention under the pretext of protecting civilians.’¹⁸⁸ The spokesman further emphasized that the adopted resolution is in consistence with the decision of the African Union Peace and Security Council ‘to respect the unity and territorial integrity of Libya and its rejection of any foreign military intervention, whatever its form.’¹⁸⁹ The delegation of South Africa seemed to equal the term ‘foreign occupation’ with ‘foreign military intervention’. There is a discrepancy between the statements of Russia, saying that large-scale military intervention is a possibility, and South Africa who claimed that military intervention and foreign occupation is prohibited. Neither of the two countries provided for a closer description of their understanding of the expression ‘military intervention’, and their statements does therefore not give further guidance as for the content of the term ‘foreign occupation force.’

The term the Council agreed to implement in the text of resolution 1973 was a ‘foreign occupation force’ and not military intervention. Except from the statement of South Africa, it does not seem as if the Council intended to deviate from the content the term ‘occupation’ has been given pursuant to the Hague Relations. The expression ‘a foreign occupation force’ can therefore be understood in light of the content given to the similar term in the Hague Relations.

In order for ground forces in Libya to qualify as a ‘foreign occupation force’ these must thus have the factual control over any part of the territory.

¹⁸⁷ UN Doc.S/PV.6498

¹⁸⁸ UN Doc.S/PV.6498

¹⁸⁹ PSC/PR/COMM.2(CCLXV)

In its Kosovo Advisory Opinion the Court also said that subsequent practice of states affected by the resolution can provide guidance in the interpretation.¹⁹⁰ In April media reported that British Special Forces soldiers were already operating in Libya. By mid-April, Britain, France and Italy all reported that they were to send military experts to act as advisors to Libya's opposition forces.¹⁹¹

While sending such experts, advisors and instructors, leaders of all the three countries insisted that NATO would not escalate its presence in Libya.¹⁹² Cameron underscored that the UN Security Council resolutions meant that the allies were 'not allowed, rightly, to have an invading army.'¹⁹³ On the question of whether he categorically ruled out any form of ground force, Cameron replied that 'what I've said is there is no occupying force, no invasion.'¹⁹⁴ Cameron thus seemed to draw a line between the legality of the ground troops he had deployed in Libya, the Special Forces and military advisors, and an occupation force which was prohibited by the mandate.

While President Obama of the US has uttered that he will not send ground combat troops into Libya, newspapers have reported of CIA activities in Libyan territory. In a meeting in Washington concerning the US operations in Libya, the US Defence-Secretary, Robert Gates, declined to comment on questions about CIA activities in the country.¹⁹⁵

Even though the subsequent practice of these states is not consistent and not much information is shared on the activities of these ground troops, it does nevertheless seem to indicate that the phrase 'foreign occupation force' does not rule out all forms of foreign military personnel on Libyan territory.

¹⁹⁰ Kosovo Declaration of Independence, para.94

¹⁹¹ CBC News (21April2011)

¹⁹² CBC News (21April2011)

¹⁹³ CBC News (21April2011)

¹⁹⁴ The Telegraph (18April2011)

¹⁹⁵ The Guardian (31March2011)

In brief, paragraph 4 of resolution 1973 explicitly draws the outer limit of the operation in Libya, by specifically excluding a 'foreign occupation force.' Applying the content the term has been given pursuant to the Hague Relations, what is prohibited by the mandate is a foreign force which exercises effective control on any part of the Libyan territory.

The foreign ground forces deployed by NATO and its allies in Libya participate in the civil war by giving military advice to the rebels, pointing out targets for accurate airstrikes at these and other war acts. However, these ground forces do not seek to take effective control over any part of the Libyan territory. The rebels and the pro-Qaddafi forces are in control of and fight to enlarge their parts of the territory. Even if the foreign ground forces provide support to one of the parties in the civil war, the foreign forces are under the control of that part, and do not seek to gain control over the territory themselves.

The actual use of ground forces in Libya, i.e. the deployment of military experts and advisors, Special Forces and CIA agents are not of the intensity as to qualify as an occupation force. These ground forces are therefore not prohibited as a measure of a foreign occupation force under paragraph 4 of resolution 1973. Nonetheless, whether these forces are indeed permitted under paragraph 4 of resolution 1973 depends on whether their actions are directed exclusively towards the protection of 'civilians and civilian populated areas under threat of attack.'

In conclusion, Security Council resolution 1973 permits the coalition forces to deploy ground forces in Libya.

4 Conclusion

In both resolutions 1970 and 1973 the Security Council made explicit reference to the responsibility to protect. In a statement following the adoption of resolution 1973 the UN Secretary-General, Ban Ki-moon, apprehended the resolution as an affirmation of the international community's determination to implement its responsibility to protect.¹⁹⁶

In the General Assembly dialogue on the responsibility to protect held in July 2011 while the crisis in Libya was still enduring, forty three Member States, three representatives from regional organizations and four representatives from civil society, expressed their views on the responsibility to protect.¹⁹⁷ During the debate most member states voiced support for the principle and supported its continued implementation. However, several countries raised concern with regard to the manner in which NATO used force to implement resolution 1973 in Libya. Mexico underscored that differences in the interpretation of the resolution's mandate had negatively affected the response of states on other international issues. The General Assembly President acknowledged that in the aftermath of the present crisis the remaining challenge was to ensure a coherent and impartial implementation of the responsibility to protect.

While China and Russia did not want to block a collective action to save civilians suffering from atrocities in Libya, they early declared that they will not contemplate any similar armed operation in Syria, regardless of the atrocities the regime of president Bashar al-Assad inflict on civilian opponents. On October 4, the two joined forces to veto the proposed Security Council resolution condemning Syria.¹⁹⁸ When explaining its abstention, Russia emphasized that in the proposed draft there was no wording on the

¹⁹⁶ UN Press Release SG/SM/13454

¹⁹⁷ UN Doc. GA/11112

¹⁹⁸ UN Doc. S/PV.6627

non-acceptability of foreign intervention. Russia underscored that it did not wish for a military operation similar to the one carried out by NATO and the allies in Libya.

As envisaged in regard of the vetoed draft on Syria, the military operation in Libya can make it more difficult to unite the Security Council, which is a political body, on future decisions when it comes to the protection of civilians. Despite the ongoing work in the UN in order to implement the responsibility to protect, the responsibility is thus still a moral or political, rather than a legal, undertaking.¹⁹⁹ The obligation for the international community to protect populations with military action in a last resort can only be fulfilled in accordance with a legal right to resort to forcible measures, for example, authorized by the Security Council under its Chapter VII of the UN Charter.

¹⁹⁹ Schmitt (2011)

5 Litterature

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